certainty for platform providers. The remaining hurdles that arise for a successful product liability claim are more easily addressed. Two of those more significant obstacles are categorizing the type of defect the product has and demonstrating causation between that defect and the plaintiff's harm.

b. Defect Categorization

Harmful algorithms contain manufacturing defects, design defects, and are defective due to inadequate warnings, thereby satisfying the defectiveness requirement of strict product liability.[28] If platform providers do not claim that algorithmic flaws depart from its intended design, as required for proving a manufacturing defect, it may be possible to pursue an alternative claim under negligence, using such admittance as evidence of intention. Inadequate warnings or instructions for use are rampant across platform providers, and even when provided, are questionably beneficial given the method in which they are displayed and the power imbalance evident in the provider-consumer relationship.[29] Proving a design defect may be the most difficult for claimants. Design defects refer to defects existent at the time of distribution where "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design."[30] Although the burden laid upon the claimant to demonstrate "the availability of a reasonable alternative design" is not always enforced, it remains the "predominant, yet not exclusive, method for establishing defective design."[31] Specifically, claimants must typically demonstrate "whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design…rendered the product not reasonably safe."[32] In the context of algorithms, it is important to consider whether this question could serve as an insurmountable obstacle to bringing an algorithmic harm claim if required by courts, thereby defeating algorithmic harm claims alleging design defects.[33] Alternatives to harmful algorithms have received much consideration. Modern findings consider the ethics behind algorithmic harms and discrimination, establish frameworks for a more nuanced evaluation of those harms to prevent systematic bias, and point to the possibility of integrating anticipatory bias correction into dynamic learning models.[34] This warrants optimism for individuals who encounter algorithmic harms now

[28] Restatement (Third) of Torts: Prod. Liab. § 2 (1998)
[29] See, e.g., Clayton, K., Blair, S., Busam, J.A. et al., *Real Solutions for Fake News? Measuring the Effectiveness of General Warnings and Fact-Check Tags in Reducing Belief in False Stories on Social Media*, Dartmouth 42, 1073–1095 (2020).
[30] Restatement (Third) of Torts: Prod. Liab. § 2 (1998).
[31] *Id.*
[32] *Id.*
[33] Notably, an inability to identify a reasonable alternative design is not necessarily an inherent bar to a finding of a product defect. As suggested in the Restatement, there exists "the possibility that product sellers may be subject to liability even absent a reasonable alternative design when the product design is manifestly unreasonable."
[34] Michele Loi, Christoph Heitz, *Is calibration a fairness requirement?: an argument from the point of view of moral philosophy and decision theory*, 2022 ACM Conference on Fairness, Accountability and Transparency, 2026-2034 (2022); Mireia Yurrita, Dave Murray-Rust, Agathe Balayn, Alessandro Bozon, *Towards a multi-stakeholder value-based assessment framework for algorithmic systems*, 2022 ACM Conference on Fairness, Accountability and Transparency, (2022); Abdulaziz A. Almuzaini, David M. Pennock, Chidansh A. Bhatt, Vivek K. Singh, *ABCinML:*

or in the future, but less so for those that were harmed prior to these findings, as platform providers would not necessarily have access to a reasonable alternative design. This presumption could be rebutted, however, if claimants could prove that platform providers had actual knowledge of better alternatives yet chose their employed algorithm in spite of its harms.[35] Therefore, it is likely that algorithmic harms can point to each type of defect existing at the time of distribution for newer claimants. Yet for many plaintiffs with older experienced harms, this problem persists. This issue is one of the many that fall between the gap between current strict product liability law and the needs of harmed individuals.

II. Remaining Issues for Algorithmic Harms under Strict Product Liability

For product liability to adequately and efficiently address the novel issues posed by algorithmic harms, two primary changes would need to be made to current doctrine. Firstly, the potential imposition of a reasonable alternative design query by the courts would have to be reexamined. Secondly, and more importantly, the causal nexus requirement must be reexamined to capture the delayed harms posed by algorithms coupled with sequential events through several analogous situations. Notably, identifying platform providers under a format akin to res ipsa loquitur could better serve claimants seeking to bring claims of algorithmic harms by lowering administrative burdens, increasing accessibility to recourse, and ensuring greater accountability of platform providers. Increasing surety in the application of strict product liability to algorithmic harms is necessary so that claimants are not required to untangle a web of complexity to seek redress, especially since claimants are more likely to be harmed if they come from a lower socioeconomic background and are consequently less likely to be able to afford legal counsel.[36]

As noted earlier, the reasonable alternative design standard may restrict claimants with comparatively older algorithmic harm claims should they be unable to prove that platform providers were actually aware of better alternatives yet chose their employed algorithm in spite of its harms. This requirement in certain cases may turn out to be easily satisfied. Meta, for example, previously used an advertising tool allowing advertisers to tailor the dissemination of their advertisements, while discriminating against those who held special protected characteristics such as racial identity or sexual orientation.[37] Although Meta cannot be blamed for an advertiser's interest in appealing to certain audiences, they could be held liable for allowing their algorithms to function as a vehicle for discriminatory advertising efforts. Similarly, on a case-by-case basis,

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Anticipatory Bias Correction in Machine Learning Applications, 2022 ACM Conference on Fairness, Accountability and Transparency, 2026-2034 (2022), 1552-1560 (2022).

[35] *See, e.g.*, Georgia Wells, Jeff Horwitz, Deepa Seetharaman, *Facebook Knows Instagram is Toxic for Teen Girls, Company Documents Show*, The Wall Street Journal (Sept 14, 2021) https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=hp_lead_pos7&mod=article_inline.

[36] Karen Levy, Kyla E. Chasalow & Sarah Riley, *Algorithms and Decision Making in the Public Sector*, 17 Annu. Rev. Law. Soc. Sci. 309-334 (2021).

[37] Justice Department and Meta Platforms Inc. Reach Key Agreement as They Implement Groundbreaking Resolution to Address Discriminatory Delivery of Housing Advertisements, (2023), https://www.justice.gov/opa/pr/justice-department-and-meta-platforms-inc-reach-key-agreement-they-implement-groundbreaking.

courts may consider practically whether there was a glaring reasonable alternative design, such as refusing to allow housing advertisers to discriminate by targeting specifically tailored racial groups. More simply than complex adjustments for implicit systematic bias within algorithms, it appears reasonable to require, ironically, algorithmic refusal of certain inputs into other algorithms, thereby preventing direct discrimination or overt harm-causing behaviors. The reasonable alternative design requirement consequently may not function as a significant impediment to pursuing a products liability claim for older algorithmic harms if imposed.

The causative requirements under strict product liability may necessitate revision in light of the specific issues presented by algorithmic harms. Identifying causation between the algorithmic defect and the experienced harm would require the existence of a causal chain between the two activities regardless of the various subsequent elements that may have contributed to the original creation of or prolonged perpetuation of the harm. Several analogous situations in other areas of law may be relevant to consider here, including loss causation requirements under securities fraud laws, medical harm, and delayed exposure.

The public policy considerations that arise from the proximate cause requirement in tort law bears marked resemblance to the evaluation of loss causation, which arises in the context of securities fraud claims.[38] Loss causation under securities laws refers to the requirement that a plaintiff seeking to establish such fraud prove a causal nexus between the fraudulent misrepresentation or omission and the experienced loss.[39] To fulfill the evidentiary requirement for loss causation, plaintiffs must prove that "the misstated or omitted facts were a substantial factor in causing an economic loss actually incurred by the plaintiffs."[40] Similar to the variety of "inputs" that platform providers may claim are actually at fault for the plaintiff's experienced algorithmic harm, a defendant in a securities fraud claim may point to a variety of other market variables or representations to rationalize the decrease in stock price rather than the alleged misrepresentation.[41] A key strength of securities fraud claims are courts' ability to dissect a series of events that may have affected the share price of a company to identify whether there was true economic loss caused by the misrepresentation. It is evident that merely because there are other potential simultaneously or sequentially occurring contributing factors to an experienced loss, claimants are not barred from seeking recourse for their harm. Additionally, the fact that courts are

[38] *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 222 (3d Cir. 2006) ("Similar to the concept of proximate cause in the tort context, loss causation focuses on whether the defendant should be held responsible as a matter of public policy for the losses suffered by the plaintiff.").

[39] *McCabe v. Ernst & Young, LLP.*, 494 F.3d 418, 425 (3d Cir. 2007) ("A § 10(b) plaintiff must show both that (1) the plaintiff entered the transaction at issue in reliance on the claimed misrepresentation or omission (transaction causation) and (2) the defendant misrepresented or omitted the very facts that were a substantial factor in causing the plaintiff's economic loss (loss causation).").

[40] *Id.*

[41] *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 812–13, 131 S. Ct. 2179, 2186, 180 L. Ed. 2d 24 (2011) ("We observed that the drop could instead be the result of other intervening causes, such as 'changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events.' If one of those factors were responsible for the loss or part of it, a plaintiff would not be able to prove loss causation to that extent…even if the investor purchased the stock at a distorted price, and thereby presumptively relied on the misrepresentation reflected in that price.").

experienced with the factual and legal analysis required to be undertaken to distinguish between contributing and non-contributing factors indicates a simpler adoption of this inquiry.

Medical negligence cases present the complex consideration of whether the negligence of the defendant caused a novel harm or the exacerbation of a preexisting condition. In the latter circumstance, courts must untangle precisely to what degree the plaintiff's harm can be attributed to the preexisting condition versus the negligent act. The proximate cause requirement is proven through "cause-in-fact and foreseeability," requiring a demonstration that "the negligent act or omission is shown to be a substantial factor in bringing about the harm…without which the harm would not have occurred," and rationale into the damages sought.[42] Demonstrations of algorithmic harms may employ a similar model. Courts may inquire whether, but for the plaintiff's exposure to an algorithm, the plaintiff would have experienced the same harm. But-for causation would additionally allow for courts to delineate between a plaintiff's preexisting conditions and the exacerbation of that condition through exposure to the platform provider's algorithm. For example, if a plaintiff was diagnosed with depression prior to exposure to algorithms, but then began self-harming behavior due to exposure, they may be able to prove that but-for the algorithmic exposure, they would not have engaged in self-harming behavior. Additionally, it is unclear whether it should be a requirement that but-for causation should apply to only the plaintiff's exposure to an algorithm. Consider the following example: an individual, repeatedly exposed to harmful content online that could be causally linked to algorithms, commits a school shooting. A similar factual background forms the claim in *Gonzalez*.[43] If a third party is the direct recipient of the algorithmic harm, while the plaintiff is the indirect recipient of the harm because of the third party's actions, from which perspective should but-for causation apply? If but-for causation is applied from the plaintiff's perspective, their lack of exposure to direct algorithmic harm would be a firm bar to a successful claim. Yet if but-for causation were applied from the defendant's perspective, plaintiffs would be more capable of painting a compelling picture of why they experienced indirect algorithmic harm. But-for causation from the defendant's perspective would require courts to ask that but-for the defendant's use of the defective algorithm, would the plaintiff have experienced the harm in question? Evidently, the structure of the but-for question will be determinative of whether indirect algorithmic harm claims may progress.

Causation may appear more difficult to prove where the harms take longer to manifest. The impacts of algorithmic harm may not necessarily be immediately evident. Delayed exposure to harm, however, is not a phenomenon novel to algorithms. The use of asbestos led to an unfortunate string of cases involving claims alleging that the plaintiff's cancer was attributable to exposure to the chemical.[44] Successful claims would require, amongst other factors, demonstration of specific causation.[45] While general causation requires proof that exposure generally to asbestos increases the likelihood of being diagnosed with mesothelioma, specific causation refers to the higher causal

[42] *W.C. LaRock, D.C., P.C. v. Smith*, 310 S.W.3d 48, 56 (Tex.App.-El Paso 2010).
[43] Reynaldo Gonzalez v. Google LLC, (2022), cert.
[44] James A. Henderson Jr, Aaron Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 807 Cornell Law Faculty Publications (2002), 819 – 825.
[45] *Id*.

standard where a plaintiff must prove that their mesothelioma could be directly attributable to "exposure to [a particular Defendant's product] was a cause of [her] mesothelioma giving rise to liability."[46] Similarly, in the product liability context, "to establish causation, [plaintiffs] must offer admissible expert testimony regarding both general causation…and specific causation."[47] Delayed recognition of algorithmic harms therefore would not be a severe impediment to holding platform providers liable. Plaintiffs seeking to claim under exposure of a chemical which allegedly lead to a serious medical concern such as cancer are required to satisfy onerous, yet appropriately applied burdens. For example, a plaintiff diagnosed with basal cell carcinoma following exposure to excessive xylene fumes and sunlight was unable to demonstrate the connection between the exposure and the harm through an independent medical examination, medical evidence, and testimony.[48] Additionally, it remains possible that the opinions of the plaintiff's experts are rejected due to credibility concerns. The expansive avenues to prove causation in delayed exposure cases are necessary so as not to debilitate a plaintiff's ability to collect evidence, a challenge particularly burdensome when undertaken several years after the receipt of injury. Similar allowances could be made in algorithmic harm cases to achieve the same end, thereby allowing plaintiffs to achieve redress.

III. Policy Considerations for Algorithmic Harms under Strict Product Liability

A detailed examination of the practicalities of applying strict product liability to algorithmic harms initially draws optimism, given that the recognition of such harms does not expand far past the mold of other harms recognized by tort law or doctrines that are closely related to it. Yet this expansion arguably encroaches upon central tenants of strict product liability. Merely because tort law bears the potential to adapt to recognize algorithmic harms does not necessarily warrant that change. Such flexibility could have adverse consequences for future innovation through the over-imposition of liability upon platform providers flowing from "compensation culture."[49] Claimants seeking redress for non-algorithmic harms may be limited in the compensatory damages they may desire through the perception of endlessly ballooning claims. However, such misplaced concerns are by no means novel to specifically algorithmic harms. Acknowledging algorithmic harms under tort law echoes the concerns presented during the expansion of the consideration of claims of emotional harms.[50] Tort law has long been plagued by manufacturers and other parties that stand to be held liable for harms functioning as the harbingers of doom, warning of impending floods to the court of claims for harms so incredibly significant that they fundamentally alter the course of humanity. Platform providers have not restrained

[46] *Vedros v. Northrop Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556 (E.D. La. 2015).
[47] *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 268 (2d Cir. 2002).
[48] *Mayette v. Vill. of Massena Fire Dep't*, 49 A.D.3d 920, 852 N.Y.S.2d 488 (2008).
[49] See, e.g., Lord Sumption, *Abolishing personal injuries law – a project*, P.N. 2018, 34(3), 113-121.
[50] Philip L. Merkel, "*Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*," Capital University Law Review 34 no. 3, 558 (2006) ("Among the reasons given by appellate courts for refusing to expand recovery for emotional injuries were fears of a flood of litigation, a belief that mental injury could be feigned easily, that damages would rest on conjecture or speculation, and that they would be difficult to measure").

themselves from contributing to this phenomenon. In its Brief in Opposition in *Gonzalez*, Google warned that opening the door to liability under civil law generally would "threaten the basic organizational decisions of the modern internet."[51] Similarly, Reddit stated that "[a] sweeping ruling narrowing Section 230 protections risks devastating the Internet."[52] Although these claims may appear to ring true, as algorithms are the primary method through which specific content from a vast source is delivered to a consumer's screens, the relationship between mass producers and consumers is not unique to platforms. Rather, as previously addressed, that specific relationship forms the basis of the birth of product liability law. This dispute further demonstrates the importance of considering the policy implications of incorporating a novel harm into tort law. If equating causation standards in strict product liability with those of securities fraud, medical harm, and delayed exposure cases can shed light on potential solutions to establishing a chain of causation, it is equally relevant to consider the hesitancy of the courts within those analogous situations to overextending the permissions given to plaintiffs in establishing causation. Considering each analogous situation functions to firmly establish that the little flexibility that strict product liability must possess to accommodate most algorithmic harm cases is well-founded and reasonable.

Securities fraud cases have previously considered the public policy concerns expressed regarding reducing evidentiary burdens for causation standards.[53] Additionally, their factual patterns often incorporate the causation issues arising from a harm that is followed by several sequentially occurring events, rather than simultaneously occurring events.[54] In *Dura Pharms,* for example, the court noted that "[a]llowing a plaintiff to forgo giving any indication of the economic loss and proximate cause would bring about the very sort of harm the securities statutes seek to avoid, namely, the abusive practice of filing lawsuits with only a faint hope that discovery might lead to some plausible cause of action." Similarly, given the widespread nature of algorithmic harms, claimants may be encouraged to file a lawsuit against a platform provider with little substantive evidence as to the particular harm resulting from the alleged defect. Recognizing the number of individuals who are impacted by algorithms and are therefore potentially capable of bringing such a claim, this could lead to a significant administrative burden even if the majority of these claims were turned away upon initial review. If, for example, self-harming behaviors in teenagers from 13 to 16 years old between 2011 to 2014 could be attributed to algorithms on Instagram, and Facebook, it may result in repetitive claims brought against the same selection of platform providers.[55] Yet the existence of pervasive harms is no reason to avoid holding parties accountable. Rather, it should be grounds to further ensure that those harms are addressed.

[51] Brief in Opposition, p. 30, *Gonzalez v. Google LLC* (2023).
[52] Brief for Reddit, Inc. and Reddit moderators as Amicus Curiae, p. 22, *Gonzalez v. Google LLC* (2023).
[53] See, e.g., *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 337, 125 S. Ct. 1627, 1629, 161 L. Ed. 2d 577 (2005) ("Allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause would bring about the very sort of harm the securities statutes seek to avoid, namely, the abusive practice of filing lawsuits with only a faint hope that discovery might lead to some plausible cause of action.")
[54] Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 82 Iowa L. Rev. 811, 838 (2009).
[55] *See, e.g.* Charley Coleman, *Social media: potential harm to children*, (Jan 17, 2022), https://lordslibrary.parliament.uk/social-media-potential-harm-to-children/.

Cognizant of this fact, tort law has served as a venue for similar claims involving a higher number of individuals. Product liability does not hold a direct equivalent to res ipsa loquitur, which refers to a "form of circumstantial evidence…establish[ing] the defendant's likely negligence" where the harm caused to the plaintiff "is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is relevant member."[56] Instead, strict product liability claimants may look to class action mass torts as an alternative. Class action mass torts are a legal mechanism permitting the settlement of claims involving membership of even hundreds of thousands of individuals, with recognition of the potential for future claimants, and without conferring unnecessarily burdensome issues relating to administration at every trial stage.[57] Perhaps more crucially yet is the potential role that litigation class actions may take, allowing for the resolution of the fundamental underlying factual and legal issues on a class wide basis. Class actions are available for product liability, although they require "strict adherence" to Rule 23 of the Federal Rules of Civil Procedure.[58] This could reduce administrative costs while ensuring that victims of algorithmic harms were able to seek recourse.

Although but-for causation may appear as a valid framework for establishing algorithmic harm causation, its application is far more difficult. Plaintiffs may have difficulty delineating exactly which points they came into contact with the algorithm itself versus other features of the platform, thereby not truly satisfying the question of whether exposure specifically to the *algorithm* was the significant cause of their harm. It would therefore be necessary for product liability to recognize that singular or various subcomponents could generally contribute to the defect in question. Unhelpfully, product liability does not hold this recognition. Plaintiffs are not always able to allege that defective subcomponents, coupled with a service's failure to correct them, are sufficient to satisfy product liability's requirements for a "product."[59] Wading further into murkier waters to justify that exposure to the algorithm incidental to platform usage would risk muddling the product and service categorization previously considered. It is additionally unclear why but-for causation should be applied for the experiences of a third party to the claim under product liability. A derivative claim refers to a "claim that derives from the defendant's tort against a third person," where "negligence of the third person is imputed to the plaintiff with respect to that claim."[60] This option, however, appears to only be available for negligence claims rather than product liability. It would be necessary for product liability to make a similar recognition for providers to be held liable for harms leading to third-party driven acts. Opening the door to but-for causation from a third party's perspective under product liability would be dubious where alternative forms of legal recourse remain and would be far better applied. The claimants in *Gonzalez*, for example, could perhaps pursue recourse under a negligence claim and thereby also establish Google's responsibility for the indirect algorithmic harm experienced.

[56] Restatement (Third) of Torts: Phys. & Emot. Harm § 19 (2010)
[57] Executive Summary [1], MASSTORTCA EXEC SUM
[58] *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271 (S.D. Ohio 1997).
[59] *Sabicer v. Ford Motor Co.*, 362 F. Supp. 3d 837 (C.D. Cal. 2019).
[60] Restatement (Third) of Torts: Apportionment Liab. § 6 (2000).

Some additional policy obstacles presented by algorithmic harms under strict product liability is the timeline in which plaintiffs may bring claims. It is uncertain whether the plaintiff's alleged harm would arise from the initial exposure to a specific piece of content delivered due to algorithmic design, for the general harm that results from longstanding exposure to algorithmically driven content, or from repeatedly from specific harms that arise following exposure to such content. In its most extreme example, plaintiffs may allege that mere exposure to an algorithm warrants redress, regardless of their current lack of harm, given the potential of future harm manifesting from their previous algorithmic exposure. [61] The latter example is unfounded within product liability law, which necessitates proof of an experienced harm and the satisfaction of the causative analysis between the harm and the defective product. The earlier queries, however, are substantially more founded. However, asbestos litigation demonstrates that the single-action rule can be overwritten so that, after the conclusion of a plaintiff's initial suit, if they go on to experience further development of the harm, they are not barred from bringing another claim for the same harm against the same defendant.[62]

Upon concluding that damages should be awarded to victims of algorithmic harms, it is additionally relevant to consider how those damages should be assessed. While damages for non-economic harms are frequently awarded, quantifying the harm and the corresponding reward poses a unique difficulty. Juries awarding damages are given "wide latitude," broad "procedural discretion," and are provided "no objective benchmarks for valuing them," owed to the "intensive investigation of very particularized circumstances."[63] The high degree of variability in awarding damages can result in overdeterrence, leading to the defendant refusing to continue production of the product rather than incorporating the cost of potential liability into the product's value.[64] Rather than removing liability for non-economic harms however, because of the potential burden that they may impose upon platform providers, an award matrix could help to provide greater certainty and less variability for the damages arising from algorithmic harms.[65]

It is evident that algorithms are capable of being classified as a defective product, thereby giving rise to valid claims under strict product liability law. In contrast to initial perceptions, strict product liability would not need to be fundamentally altered to achieve the goal of recognizing algorithmic harms. Causative questions relating to delineating the algorithmic harm from other experiences of the plaintiff's, exacerbation of preexisting conditions, and delayed response to the harm are generally easily resolved by reference to analogous situations. Issues arise, however, in applying the derivative claim model for negligence claims to product liability to address third-

[61] Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation. Where Should Tort Law Draw the Line?*, 80 Brook. L. Rev. (2015); Exposure to unmanifested product defects would be a clear example of empty suit litigation, which nonetheless has amounted to basis for awarding damages. Such claims, however, would typically allege economic loss rather than product liability, thus falling outside of the scope of this paper.
[62] James A. Henderson Jr, Aaron Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 807 Cornell Law Faculty Publications (2002), 819 – 825.
[63] Randall R. Bovbjerg, Frank A. Sloan, James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 Nw. U. L. Rev. 908, 2-3.
[64] *Id.*
[65] *Id.*

party acts. Additionally, class actions may function as an important vehicle to reduce costs to individuals seeking recourse and to lower administrative burdens generally, thereby working somewhat similarly to res ipsa loquitur under negligence. The lack of high barriers to bringing a claim under strict product liability further demonstrates the capability of using tort law as a tool of deterrence to promote healthier algorithm development that does not merely prioritize advertiser interests or platform provider profits. Tort law thus offers an appealing weapon in the form of strict product liability to combat algorithmic harms. Doing so would satisfy the core tenants of tort law, namely its goals of deterrence, compensation, and justice.

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August 2, 2023

The Honorable Judge Kimberly A. Swank
United States District Court for the Eastern District of North Carolina
United States Courthouse
201 South Evans St., Rm 209
Greenville, NC 27858

Dear Judge Swank:

I am writing to apply for the 2024-2025 term clerkship in your chambers. I am a third-year law student in the top 5 percent of my class at the University of California Law, San Francisco (formerly UC Hastings). My interest in a law clerk position is driven by my desire to be a litigator. As a former bailiff for a superior court judge in Arizona, I had the firsthand experience of working at the elbow of a Judge where I assisted pro se litigants navigating family court. The experience and relationship I built with my Judge helped spark my desire to be back in the courtroom. I am extremely impressed by your extensive and varied litigation background, and I believe you would be a tremendous person to learn from.

This summer, I worked at the law firm *Abbey, Weitzenberg, Warren & Emery*, gaining experience drafting briefs, motions, memos, and demand letters, and working with all manner of clients and attorneys. During my first-year summer, I gained research experience working at a Land Use clinic, exploring, and writing blogs on the connection between affordable housing and better health outcomes. I am currently a senior editor for the UC Law SF Communications & Entertainment Journal, an active member of the UC Law SF Moot Court Team, and a Teacher's Assistant for the Appellate Advocacy course. This past year, I also wrote a paper on strategies for addressing the national teacher shortage. Through these experiences, I have had the chance to develop significant research and writing skills.

I would greatly appreciate the chance to meet with you to discuss my candidacy. Thank you so much for considering my application.

Sincerely,

Colt Watkiss

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UC Law SF Communications & Entertainment Journal, Senior Editor
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Elisabeth Haub School of Law at Pace University, White Plains, NY
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LEGAL EXPERIENCE

Abbey, Weitzenberg, Warren & Emery, Santa Rosa, CA
Summer Law Clerk May 2023 – Present
Worked on general litigation and personal injury contingency cases. Researched and drafted briefs, motions, and memoranda. Communicated with clients to prepare responses to discovery and demand letters. Reviewed, analyzed, and completed documents for expert review. Aided in client calls, assisted with depositions, and participated in mediations including analyzing evidence, preparing questions, managing clients, and building case strategies.

Land Use Law Center, White Plains, NY
Student Associate/Summer Associate September 2020 – December 2021
Researched and drafted memoranda on land use topics including "maker" zoning districts, adaptive reuse, and the history of accessory dwelling units. Researched and drafted blog posts on human health, equity, and land use. Researched and uploaded statutes, ordinances, senate bills, etc. to a database of pandemic-related land use mitigation strategies. Helped facilitate and presented at a final conference to discuss findings.

Jeffery G. Miller National Environmental Law Moot Court Competition, White Plains, NY
Judges Committee Volunteer December 2020 – March 2021
Helped prepare and execute an environmental moot court competition.

Maricopa County Superior Court, Phoenix, AZ
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Helped pro se litigants navigate family court. Worked with attorneys, judges, litigants, and other professionals. Researched case histories and prepared document packets. Edited and formatted court orders. Managed a full case calendar.

EXPERIENCE

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NOTEWORTHY

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(/StudentSelfService/)

Watkiss,Colt

Student Academic Transcript

Academic Transcript

Transcript Level

Law-JD

Transcript Type

Law School Transcript

Student Information Degree Awarded: Institution Credit Transcript Totals

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

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Curriculum Information

Current Program :

College

School of Law - Full Time

Major and Department

Law, Law

Degree Awarded:

Sought

Doctor of Jurisprudence

Major

Law

Institution Credit

Term : Fall 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Course Attributes	Start and End Dates	R
LAW	610A	03	Civil Procedure	A	4.000	16.00			
LAW	621	03	Criminal Law	A	4.000	16.00			
LAW	622C	03	Legal Skills I	A	3.000	12.00			
LAW	631	03	Torts	B	4.000	12.00			

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	15.000	56.00	3.73
Cumulative	15.000	15.000	15.000	15.000	56.00	3.73

Term : Spring 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Course Attributes	Start and End Dates	R
LAW	601	03	Contracts	A	4.000	16.00			
LAW	622D	03	Legal Skills II	A	3.000	12.00			
LAW	634	03	Property	A	4.000	16.00			
LAW	646	03	Constitutional Law	A	4.000	16.00			

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	15.000	60.00	4.00
Cumulative	30.000	30.000	30.000	30.000	116.00	3.87

Term : Summer 1 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Course Attributes	Start and End Dates	R
LAW	829FP	03	Externship Legal Services	A	5.000	20.00			
LAW	829S	03	Ext:Legal Services Seminar	A	1.000	4.00			

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	6.000	6.000	6.000	6.000	24.00	4.00
Cumulative	36.000	36.000	36.000	36.000	140.00	3.89

Transcript Totals

Transcript Totals - (Law-JD)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	36.000	36.000	36.000	36.000	140.00	3.89
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	36.000	36.000	36.000	36.00	140.00	3.89

Printed: 16 Jun 2023 Page: 1 of 1

University of California NAME: Colt C Watkiss ID No.: 0598202
College of the Law, San Francisco Academic Program: JD

20/YR YEARLONG 2020
TRANSFER CREDITS FROM PACE UNIVERSITY WESTCHESTER

CIVIL PROCEDURE I	105	CR	T	0.0	4.0	0.00	
CONSTITUTIONAL LAW I	120	CR	T	0.0	3.0	0.00	
CONTRACTS	110	CR	T	0.0	4.0	0.00	
PROPERTY	125	CR	T	0.0	4.0	0.00	
CRIMINAL LAW	115	CR	T	0.0	4.0	0.00	
TORTS	130	CR	T	0.0	4.0	0.00	
LEGAL RESEARCH & WRITING I	131	CR	T	0.0	3.0	0.00	
EXTERNSHIP FIELDWORK	900	CR	T	0.0	5.0	0.00	
LEGAL RESEARCH & WRITING 2	970	CR	T	0.0	3.0	0.00	
				0.0	34.0	0.00	0.000 0.000

22/FA FALL 2022

FINANCIAL BASICS FOR LAWYERS	881	11	CR	N	2.0	2.0	0.00
APPELLATE ADVOCACY: CIVIL	821	13	A-	N	2.0	2.0	0.00
CONSTITUTIONAL LAW 2	290	12	A	I	4.0	4.0	16.00
PUBLIC LAW & POLICY WRK GROUP	780	11	B+	I	3.0	3.0	9.90
CRIMINAL PROCEDURE	328	12	A-	I	3.0	3.0	11.10
WRITING REQ'T FOR LAW780	998	10	M	N	0.0	0.0	0.00
					14.0	14.0	37.00 3.700 3.700

23/SP SPRING 2023

EVIDENCE	368	23	A+	I	4.0	4.0	17.20
FEDERAL COURTS	376	21	A-	I	3.0	3.0	11.10
STAT: INTELLECTUAL PRO	178	21	A	R	3.0	3.0	12.00
NEGOTIATION	838	23	A	N	3.0	3.0	0.00
MOOT COURT INTERCOLL COMPET	973	21	CR	N	2.0	2.0	0.00
					15.0	15.0	40.30 4.030 3.865

23/FA FALL 2023

UPPER DIV JD BILLING CLASS	150	12	IP	Z			
					0.0	0.0	0.00 0.000 3.865

C U M U L A T I V E T O T A L S

Cred. Att.	Cred. Cpt.	GPA Cred.	Grade Pts.	GPA
29.00	63.00	20.00	77.30	3.865

Honorable Greg Como
Juvenile Division
Division 45

Superior Court of Arizona
Maricopa County

3131 W Durango Rd
Phoenix, AZ 85009
(602)372-0754

August 1, 2023

Dear Sir/Madam:

I am pleased to write this letter supporting Colt Watkiss' application for a judicial clerkship.

I have known Colt for more than 15 years. I first met him when he was my son's close friend in middle school. I later hired Colt as my Courtroom Assistant (Bailiff), while he was waiting to begin law school.

Colt was my Courtroom Assistant from June 2019 through March 2020 -- when I was on the Family Court bench. It is a busy court. Colt had many responsibilities, including preparing my case files, monitoring courtroom activities, and interacting with litigants and counsel who called with questions. Colt handled all of these responsibilities well, but what stood out the most was his interaction with anxious litigants. Many people in Family Court represent themselves. They are on edge emotionally, and often perplexed by the legal system. Time and again, I observed Colt patiently and respectfully answer their questions. Put simply, he understands what public service means.

Colt has several traits that will make him an excellent judicial clerk. First, he has a strong work ethic. I could always count on Colt to get the job done properly and on time. Second, he is intellectually curious. Many high-achieving students apply to become judicial clerks. Most can explain *what* the law is, but they are not always interested in *why* the law is what it is. Colt seeks to know both. Finally, he is just likeable. In a stressful profession, it is nice to have people around who can make you laugh or smile, and Colt does that.

I wasn't entirely sure what to expect when I offered a professional job to a young man I remembered as a goofy, fun kid. I was pleasantly surprised when he became such a valued member of my team. Colt is the type of person who makes his boss look better. I could not recommend him more highly.

I would be happy to answer any questions you may have about Colt Watkiss.

Sincerely,

Hon. Greg S. Como
Maricopa County Superior Court

ABBEY, WEITZENBERG, WARREN & EMERY P.C.

LEWIS R. WARREN
BRENDAN M. KUNKLE
MITCHELL B. GREENBERG
MICHAEL D. GREEN
SCOTT R. MONTGOMERY
JAIMEE A. MODICA
RICHARD W. ABBEY*
W. BARTON WEITZENBERG
PATRICK W. EMERY
JOHN M. SANFORD
DANIELLE N. PODSHADLEY
BRIAN G. LANCE
SARAH M. LEWERS
DANIEL J. WILSON
KAITLYN D. WRIGHT
KATHERINE C. POND
Retired

Attorneys and Counselors at Law

jmodica@abbeylaw.com

July 31, 2023

Re: Letter of Recommendation for Colt Watkiss

Dear Sir or Madam,

I am an attorney and a shareholder at Abbey, Weitzenberg, Warren & Emery. Our practice includes many types of civil litigation, such as personal injury, business litigation, trust/estate litigation, real property disputes and contract litigation.

I write to convey the highest recommendation of Colt Watkiss for a judicial clerkship. Mr. Watkiss worked as a summer associate with my firm this summer. He had the opportunity to work with multiple attorneys in the firm and, thus, was exposed to substantive law in our many practice areas. Mr. Watkiss gained invaluable and practical legal experience during his summer with us. For example, he conducted extensive legal research, drafted legal memorandums and briefs, and attended depositions. Many of my colleagues expressed their great pleasure in working with Mr. Watkiss and their appreciation of his conscientiousness and the quality of his work. I very much share the opinions of my colleagues. Mr. Watkiss' work was excellent, and his attitude and demeanor made it very enjoyable to work with him.

Specifically, I had the pleasure of working with Mr. Watkiss on at least three active matters during his summer with the firm. I recall the stellar research he did and the creative arguments he raised in a legal memorandum he prepared for me in a pending trust/estate dispute. The defendants had refused to produce critical estate planning documents on the basis of their right to privacy, and they had raised a novel argument with respect to the requested documents. In opposing our Motion to Compel, the defendants argued that the estate planning documents could not be compelled because our clients' causes of action were premature, and, thus, the documents in question were not relevant to any viable claims. The defendants relied on a line of case wholly inapposite to the case at bar. I asked Mr. Watkiss to research the arguments raised in the defendants' opposition to our Motion to Compel. In researching the issues, Mr. Watkiss quickly understood and identified the important distinctions between our clients' case and the cases relied on by the defendants. He

100 Stony Point Road, Suite 200 • Santa Rosa, CA 95401
Phone: (707) 542-5050 • Facsimile: (707) 542-2589 • www.abbeylaw.com

asked appropriate and poignant questions to help guide him in his research. His legal memorandum was thoroughly researched, well-written and well-reasoned. In fact, it was so well done that I primarily relied on the arguments made in Mr. Watkiss' memorandum in my reply brief submitted to the Court in support of our Motion to Compel. Ultimately, the Court sided with us, overruling the defendants' privacy objections and determining that the estate planning documents at issue were discoverable. The defendants have now filed a Motion for Summary Judgment based on this same flawed legal argument and authority. I intend to use Mr. Watkiss' research and legal arguments to defeat the defendants' latest attempt to foreclose our clients' claims.

In another matter, our client, a general contractor, who had entered into a contract with a real estate broker for referral fees, received a letter from the broker's attorney threatening to file a lawsuit against our client for intentional interference with contractual relations with respect to the broker's employment contract. I asked Mr. Watkiss to research the viability of such a claim given that our client had not acted with the intent to interfere with the broker's employment contract but, instead, was acting for the purpose of preserving his own, separate business relationship with the broker's employer. Mr. Watkiss thoroughly, quickly, and competently researched this issue, providing me with several key cases and correctly summarizing and analyzing the pertinent authority. His work was so well done that I was able to adopt his research and analysis and incorporate it into my written response to the broker's attorney. Notably, we have not received any further communication from the broker's attorney regarding the threatened lawsuit. I assume he and his client have realized that their claims are without merit, in large part due to Mr. Watkiss' stellar research and persuasive written analysis.

The consensus among my colleagues at the firm is that Mr. Watkiss is amongst the best summer law clerks this firm has ever had. With respect to his legal skills, he is quick to learn, smart, creative, hardworking, and conscientious. He is determined to get the law right with respect to every legal issue. With respect to his interpersonal skills, Mr. Watkiss is kind, outgoing, cooperative, professional and works well with others. He is truly a pleasure to work with.

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I am confident that Mr. Watkiss possesses the skills, intelligence, perspective, dedication, maturity and work ethic necessary to be an excellent judicial law clerk. If given the opportunity, we would, without hesitation, hire Mr. Watkiss again. Please contact me if you would like to discuss his qualifications further. I can be reached at (415) 699-5686.

Very truly yours,

ABBEY, WEITZENBERG, WARREN & EMERY P.C.

Jaimee A. Modica

August 02, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I write to enthusiastically support Colt Watkiss's application to your chambers. As a student in my intensive required first year Legal Skills I and II courses at Pace University's Elisabeth Haub School of Law from fall 2020 through spring 2021, Colt stood out for his legal research and writing skills, his conscientiousness and participation, and his collegiality. Colt was not only a top academic performer, one of only two students who earned the top grade (an "A") both semesters, but also consistently demonstrated a strong commitment to developing the wide-ranging professional skills that will allow him to build a career as an advocate and a sensitivity to promoting a positive classroom culture. I believe strongly that Colt would be an asset to chambers and any professional environment.

The Haub Law Legal Skills course is a highly demanding and time-consuming full-year course. During the fall semester, students draft a client letter, perform legal research, and draft two interoffice memoranda. During the spring component, they conduct in-depth research into a more complex legal issue, draft a 20 page appellate brief, and compete in an oral argument competition. Each semester, there are numerous deadlines for completing written work, and I work closely with each student to provide feedback on their drafts throughout the semester.

At each stage of the research and writing process this fall, Colt was extremely diligent, starting his drafts early, meeting all deadlines, welcoming feedback, and working hard to incorporate that feedback into his writing. On each graded assignment, Colt received the highest score. His final memorandum and brief were meticulously researched, well-written, and analytically creative. He was likewise one of my strongest and most collegial contributors to class meetings; this was particularly notable given the time. We were in the heart of the pandemic when most schools were operating either fully or partially remotely. Our 1L students had the option to attend in person or remotely; Colt chose the in-person option and my classes met in person, but during a challenging time for everyone. This environment made his collegiality and positivity all the more important and notable. I know, too that he performed at a similarly high level, and with the same level of engagement and participation, in his other substantive 1L law classes.

I also had several opportunities to talk with Colt about his professional goals, his summer position that first summer with our school's renown Land Use Law Center, and his life, in my role as the Director of the Public Interest Law Center and the Environmental Program Career Specialist. Colt came to Haub Law enthusiastic about environmental and land use law issues, but also open to broader academic and professional practice areas. Even as a first-year student, he became engaged in research and extracurricular activities with faculty and staff in the law school's Centers, and was respected for his work and enthusiasm.

In sum, along with his strong academic skills and performance, I know Colt will bring the important intangibles to any academic environment - a wonderfully positive attitude and a high degree of engagement. Again, I enthusiastically recommend Colt for this program!

Respectfully yours,

Elyse Diamond
Director, Public Interest Law Center & Adjunct Professor of Law

Elyse Diamond - elyse151@gmail.com - 914-712-5304

Writing Sample

Colt C. Watkiss

III. THE THIRD APPELLATE DIVISION CORRECTLY DETERMINED THAT ANTONIA HAS A LIBERTY INTEREST IN USING CONTRACEPTION THAT IS BEING VIOLATED BY THE NEW SCOTLAND PUBLIC HEALTH LAW, ART. 7, § 381.

The New Scotland Public Health Law, art. 7, § 381 is an unjustified intrusion on Antonia's protected liberty interest in using contraception and is therefore unconstitutional.

A. There is a Fundamental Right to use Contraception.

The Supreme Court has established that there is a fundamental right to use contraception within a larger right to privacy protected by the Due Process Clause of the Fourteenth Amendment. *See Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 443, 453-55 (1972); U.S. Const. amend. XIV. The right to privacy includes "the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). At the "heart of this cluster of constitutionally protected choices" are choices regarding childbearing, and access to contraception is essential to protecting the constitutional right to make these choices. *Carey v. Population Servs. Int'l*, 431 U.S. 684-85, 88-89 (1977).

i. The Supreme Court's decision in *Dobbs* did not overrule the right to use contraception.

The Court's decision in *Dobbs v. Jackson Women's Health Org.* did not overrule the right to use contraception. 142 S. Ct. 2228, 2258 (2022). Five Justices stated that the other fundamental rights recognized within a larger right to privacy are unaffected by the decision. *Id.* at 2258, 2301 (Thomas, J., concurring), 2309 (Kavanaugh, J., concurring). While the *Dobbs* decision overruled the right to an abortion, the Court concluded that abortion is unlike the other fundamental rights within the right to privacy because abortion destroys "potential life" or "the life of an 'unborn human being.'" *Id*. at 2258 (citation omitted). Thus, abortion cannot be

compared to these other rights. "They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way." *Id*.

B. The Right to use Contraception Extends to Minors.

The Court has extended the fundamental right to use contraception to minors. *See Carey*, 431 U.S. at 693 ("[T]he right to privacy in connection with decisions affecting procreation extends to minors as well as to adults"; *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

C. Burdens on the Rights of Minors to use Contraception can Only be Justified by Significant Interests that are not Present in the Case of Adults.

Traditionally, laws burdening fundamental rights, such as contraception, must pass strict scrutiny. *Carey*, 431 U.S. at 686. The law must be narrowly tailored to serve a compelling state interest. *Id.* However, the Court has recognized that the state has greater control over the conduct of children than adults. *Id*. at 692. Therefore, the Court in *Carey* held that "State restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest…that is not present in the case of an adult.'" *Carey*, 431 U.S. at 693 (citation omitted).

i. Allowing minors to use contraception without parental consent does not violate the parental liberty interest.

The Supreme Court has repeatedly recognized the liberty interest of parents in directing the upbringing of their children. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972). However, it is only when a state actor *compels* interference in the parent-child relationship that

courts have recognized a violation of the parental liberty interest. *See Anspach v. Philadelphia*, 503 F.3d 256, 262 (3d Cir. 2007); *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980). Additionally, "there is no constitutional right to parental notification of a minor child's exercise of reproductive privacy rights." *Anspach*, 503 F.3d at 269; *see also Doe*, 615 F.2d at 1169.

In *Doe*, the Sixth Circuit held that a publicly operated family planning clinic did not violate the constitutional rights of a class of parents by distributing contraception to minors without parental notice. *Doe*, 615 F.2d at 1163, 69. In the year before the suit was filed, the clinic had supplied contraception to hundreds of minor females ages fourteen through seventeen. *Id.* at 1163. However, the court determined that the state, acting through the clinic, neither required minors to avail themselves of the services, nor prohibited the parents from participating in the minors' decisions. *Id.* at 1168. Instead, the state "merely established a voluntary birth control clinic." *Id.* (distinguishing *Meyer*, 262 U.S. at 390; *Pierce*, 268 U.S. at 530).

Similarly, in *Anspach*, the Third Circuit held that a public health clinic's administration of emergency contraception to a sixteen-year-old minor without parental notice or consent did not violate the parent's constitutional rights. *Anspach*, 503 F.3d at 260, 71. The court acknowledged that the minor's decision to visit the clinic and take the emergency contraception, as well as her decision not to notify or consult with her parents, were made voluntarily. *Id.* at 264, 69. Therefore, the court concluded that absent any coercion, the clinic had not interfered with the parental rights by making voluntary birth control services available without parental consent or notice. *Id.* at 262-64, 67.

Here, allowing Antonia to access birth control without parental consent would not interfere with her parents' rights to direct her upbringing. Similar to *Anspach* and *Doe*, Antonia would not be compelled to take birth control, or even to visit a family planning clinic if the New

Scotland Public Health Law, art. 7, § 381 is held unconstitutional. R at 21; *Anspach*, 503 F.3d at 264, 69; *Doe*, 615 F.2d at 1168. She also would not be prevented from notifying her parents or obtaining guidance about her decision whether to use birth control. In fact, Antonia has discussed this with her mother and father, and a decision to begin using contraception with Seely would be accompanied by a professionally developed medical plan. R at 19, 21. Enjoining enforcement of § 381 would simply allow Antonia the freedom to make decisions regarding her reproductive health of her own volition. Absent any coercion, the rights of her parents are not violated by concluding that Antonia can use contraception without parental consent, and this Court should affirm the ruling of the Third Appellate Division.

D. Parental Consent Requirements Unjustifiably Intrude on the Rights of Minors to use Contraception.

In *Carey*, the Supreme Court held that a New York law prohibiting the sale of contraceptives to minors under sixteen was unconstitutional because it was an "unjustified intrusion by the State" on the protected right of individuals to make decisions regarding childbearing. *Carey*, 431 U.S. at 687, 97-99. Additionally, the Court acknowledged it had previously held that *blanket parental-consent* requirements prior to a minor obtaining an abortion were unconstitutional. *Id*. at 693-94 (citing *Danforth*, 428 U.S. at 74). The Court went on to conclude that states have even less interest in regulating minors' access to contraception than they did in regulating access to abortion. *Carey*, 431 U.S. at 694 ("The State's interests in protection of the mental and physical health of the pregnant minor . . . are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive."). Thus, the Court similarly held that such blanket-parental consent requirements for contraception were also unconstitutional. *Id*.

In *T.H. v. Jones*, a fifteen-year-old, along with a class of minors, challenged a Utah state regulation that required minors to get parental consent prior to obtaining contraception from the Utah Planned Parenthood Association ("UPPA"), and the court enjoined enforcement of the state regulation. 425 F.Supp. 873, 875-76, 82 (D. Utah 1975). The court reasoned that "[t]he interest of minors in access to contraceptives is one of fundamental importance. The financial, psychological and social problems arising from teenage pregnancy and motherhood argue for our recognition of the right of minors to privacy as being equal to that of adults." *Id*. at 881. The court emphasized that minors were required to both consult with a physician before receiving contraception and utilize UPPA's family planning services, so the minors would be assisted by the judgment of mature and qualified adults before making important decisions about reproductive health. *Id*. at 882. Finally, the court concluded that the parental consent requirement violated the minors' constitutional right to privacy. *Id*.; *see also Planned Parenthood Ass'n. v. Matheson*, 582 F.Supp. 1001, 1009 (D. Utah 1983) (citation omitted) ("Giving birth to an unwanted child involves an irretrievable change in position for a minor as well as for an adult . . . [and] . . . the state may not impose a blanket parental notification requirement on minors seeking to exercise their constitutionally protected right to decide whether to bear or to beget a child by using contraceptives.").

Requiring *any* parental consent before minors can use contraception is also not a good policy decision. Currently, twenty-three states and the District of Columbia do not require any parental consent before a minor can access contraception, and the majority of the remaining states do not require parental consent in certain circumstances. Guttmacher Institute, *Minors' Access to Contraceptive Services*, WWW.GUTTMACHER.ORG, https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-services (last

visited Jan. 16, 2023). However, requiring parental consent *at all* does not deter sexual activity. *See Carey*, 431 U.S. at 691 (Where the Court acknowledged the "considerable body of evidence and opinion" that limiting access to contraception will not deter teenage sexual activity); *Matheson*, 582 F.Supp at 1009 ("The facts also demonstrate that a significant percentage of sexually active minors would not cease their sexual activity if access to contraceptives is conditioned on parental notification. Instead, those minors would terminate their use of contraceptives."). Sexually active teens using no contraception have a ninety percent chance of getting pregnant within a one-year period. Susan Harlap, et al., *Preventing Pregnancy, Protecting Health: A New Look at Birth Control Choice in the United States*, 36, Alan Guttmacher Institute (1991). Thus, requiring parental consent at all would seem to jeopardize the safety of minors. Such a requirement "would expose sexually active minors to the health risks of early pregnancy and venereal disease." *Matheson*, 582 F.Supp. at 1009. "It would be plainly unreasonable to assume that [the State] has prescribed pregnancy and the birth of an unwanted child [or the physical and psychological dangers of an abortion] as punishment for fornication." *Carey*, 431 U.S. at 695 (citing *Eisenstadt*, 405 U.S. at 448). If minors are going to engage in sexual activity regardless of their ability to get contraceptives confidentially, and if minors are less likely to use contraception if they cannot obtain them confidentially, then it is a good policy decision to allow minors to confidentially access contraception so that pregnancy, unwanted childbirth, and abortion do not become punishments for fornication.

The New Scotland Public Health Law, art. 7, § 381 allows only a few exceptions for minors to obtain contraception absent parental consent. R at 33. Instead, New Scotland should follow the lead of the states who do not require any parental consent prior to a minor obtaining contraception because requiring parental consent makes it more difficult for minors to practice

safe sex. Notably, the reason Antonia desires to use birth control is unrelated to sexual activity. R. at 3. Antonia simply wants to stop her severe menstrual cramping which she, her mother, and her special education teacher have all said is negatively affecting her education and life. R. at 3, 8, 9, 10, 21, 23, 27. Regardless of Antonia's subjective intent, however, requiring parental consent before a minor can use contraception is unconstitutional. "Restrictions on the distribution of contraceptives clearly burden" a fundamental right. *Carey*, 431 U.S. at 687-88. The fact that Antonia wishes to use birth control to regulate menstrual cramping as opposed to prevent pregnancy is irrelevant because the New Scotland Public Health Law, art. 7, § 381 is an unjustified intrusion on the rights of all minors to have access to contraception as part of a larger right to make reproductive decisions. At fourteen, Antonia is nearly the same age as the minor in *T.H. v. Jones* who was fifteen, and certainly within the age range the Court in *Carey* was dealing with when they decided that banning the sale of contraception to minors under sixteen was unconstitutional. R. at 3; *Carey*, 431 U.S. at 687; *T. H.*, 425 F.Supp. at 873, 83. In both cases, the courts concluded that parental consent requirements violated the teenager's constitutional rights. *Carey*, 431 U.S. at 687; *T. H.*, 425 F.Supp. at 873, 83. The New Scotland Public Health Law, art. 7, § 381 is similarly violating Antonia's right. R. at 33.

Therefore, this Court should hold that the New Scotland Public Health Law, art. 7, § 381 is unconstitutional because it is an unjustified intrusion on Antonia's liberty interest.

Applicant Details

First Name	**Fred**
Last Name	**Yu**
Citizenship Status	**U. S. Citizen**
Email Address	**fredyu00@gmail.com**
Address	**Address** **Street** **3201 Race Street, Unit 909** **City** **Philadelphia** **State/Territory** **Pennsylvania** **Zip** **19104** **Country** **United States**
Contact Phone Number	**6462794746**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2000**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Journal of Business Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gelber, James
James.Gelber2@usdoj.gov
Lynch, Dermot
Dermot.Lynch@usdoj.gov
202-591-6015
Kyriakakis, Anthony
anthony.kyriakakis@gmail.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

FRED YU

3201 Race Street, Unit 909, Philadelphia, PA 19104 | (646) 279-4746 | fyu@pennlaw.upenn.edu

August 8, 2023

The Honorable Kimberly A. Swank
United States District Court for the Eastern District of North Carolina
United States Courthouse
201 South Evans Street
Greenville, NC 27858

Dear Judge Swank:

I am a rising third year at the University of Pennsylvania Law School and would like to be considered for a clerkship in your chambers. Admittedly, I am an unconventional candidate given my age and length of work experience. However, I believe that my background will allow me to meaningfully contribute to your chambers.

As I mentioned, I am an older law student. I arrived on Penn's campus well over a decade removed from the classroom with the goal of pivoting my career to public service. Although it took some time to adjust to the heightened academic demands of law school and the sociocultural shock, I feel I adapted well on all fronts. My legal work over the past two years both in the classroom and in my internships has improved considerably. Equally important, I have cultivated a wide array of friendships that I know will last far beyond graduation. My success as law student is modest when measured against my peers, but I am proud of my accomplishments. Throughout my career and in my personal life, I have never been afraid to take on challenges, learn new things and connect with different people. In the process, I developed the grit, tenacity and humility necessary to overcome obstacles and handle failure. My modest achievements of the past two years are meaningful to me because they are a direct result of these strengths.

I know that working as a clerk will be incredibly challenging. Still, I am confident that my resilience and prior experience will allow me to succeed in the role. I would greatly appreciate the opportunity to discuss my background in greater detail. If you have any questions or should you require additional information, I can be reached via telephone at (646) 279-4746 or e-mail at fyu@pennlaw.upenn.edu. Thank you for your time and consideration.

Sincerely,

Fred Yu

Encls.

FRED YU

3201 Race Street, Unit 909, Philadelphia, PA 19104 • (646) 279-4746 • fyu@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Carey Law School
Juris Doctor Candidate, May 2024
Associate Editor, Journal of Business Law

The Wharton School, University of Pennsylvania
Master of Business Administration, Finance and Strategic Management, May 2008
Graduated with Honors (top 20% of MBA class)

University of Chicago
Bachelor of Arts in Economics, June 2000
Dean's List all four years, graduated with General Honors

EXPERIENCE

New Jersey Office of Attorney General, Division of Law — Trenton, NJ
Litigation Practice Group Intern — Summer 2023
Performed legal research, writing and analysis. Served as opposing attorney in mock trial to prepare deputies for trial.

United States Department of Justice, Criminal Division, Fraud Section — Washington, DC
Legal Intern — Spring 2023
Assisted trial attorneys with trial preparation, legal research and drafting various litigation documents.

United States Attorney's Office — Philadelphia, PA
Legal Intern — Summer 2022
Supported Assistant U.S. Attorneys in legal research and drafting motions and briefs. Worked across subject matter areas in Criminal and Civil divisions. Participated in workshops including depositions, opening statements and legal writing.

Membersoft — Bethesda, MD
Co-Founder — 2016 – 2019
Formed software company serving small businesses and partnering with startups. Built two enterprise Android applications. Advised and led product management for companies in custom software and mobile app development.

Repair Jungle — Washington, DC
Co-Founder & CEO — 2012 – 2016
Founded online marketplace for auto repair. Secured partnerships with auto repair shops in the DC area. Developed search optimization strategy generating 5,000 visitors per month. Structured and negotiated seed financing with angel investors.

Citadel Securities — New York, NY
Associate, Investment Banking — 2010-2011
Recruited to join new investment banking division. Advised companies on strategic and capital markets transactions including M&A, LBOs, debt financings, recapitalizations and spin-offs. Citadel closed the venture in 2011.

Evercore Partners — New York, NY
Associate, Corporate Advisory — 2008-2010, Summer 2007
Advised technology and telecom companies on strategic transactions including M&A, restructurings, strategic alliances, joint ventures and divestitures. Ranked in top tier of Associate class. Acted as staffing manager for Analysts in Tech Group.

Nextwave Broadband — Greenwich, CT
Senior Manager, Finance & Corporate Development — 2005-2006
Executed spectrum acquisitions and leases. Conducted analysis and due diligence on strategic investments.

Flarion Technologies (acquired by Qualcomm) — Bedminster, NJ
Manager, Business Development — 2002-2004
Managed teams in customer and partner deal execution, strategic analyses and sales support. Structured licensing and partnerships with equipment vendors. Led business case analyses with partners, customers and investors globally.

ADDITIONAL INFORMATION

Interests: golf, basketball, football, squash, movies. Performed cello competitively. Android app developer.

FRED YU
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Spring 2023

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Insurance Law	Baker	A	3.00
International Tax	Sanchirico	A	3.00
Trial Advocacy	Thompson	Credit	2.00
Journal of Business Law	NA	Credit	1.00
Externship - DOJ	Williams	Credit	6.00

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Immigration Law	Simon	A	3.00
Investigating & Prosecuting National Security Matters	Williams/Zebertavage	A	2.00
Sentencing	Kyriakakis	A+	2.00
Federal Income Tax	Sanchirico	A-	3.00
Corporate Finance	Klick	A-	3.00
Antitrust	Hovenkamp	B+	3.00
Advanced Legal Research	Tung	A	1.00
Journal of Business Law	NA	Credit	0.00

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Constitutional Law	Roosevelt	B	4.00
Criminal Law	Ossei-Owusu	B	4.00
Internet Law	Yoo	A+	3.00
Chinese Law	Delisle	A-	3.00
Legal Practice Skills	Simon	Credit	2.00

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Civil Procedure	Wang	B	4.00
Contracts	Hoffman	B+	4.00
Torts	Tani	B	4.00
Legal Practice Skills	Simon	Credit	4.00

U.S. Department of Justice

Criminal Division

James Gelber
Criminal Division, Fraud Section
1400 New York Avenue, NW
Bond Building, 4th Floor
Washington, D.C. 20530

Telephone (202)616-1488

James.gelber2@usdoj.gov

July 21, 2023

University of Pennsylvania Law School
clerkrecommend@law.upenn.edu

Re: Letter of Recommendation for Fred Yu

Dear Judge:

This letter is written as a recommendation for law student Fred Yu. Fred worked for me this Spring as an intern at the Fraud Section in the Criminal Division of the Department of Justice. For your reference, I'm a very long-term federal prosecutor. I was in private practice for ten years after graduation from Harvard Law School but I have been with DOJ since 1989. Much of that time was as an AUSA in Vermont but I have been with the Fraud Section since May, 2016. I specialize in cases of fraud relating to US spending in Afghanistan, partially because I worked there for DOJ for a significant length of time.

Let me start by saying I was very impressed by Fred. His research and analysis are excellent; his writing is very good; and his work ethic is terrific. I am working on a long-term investigation of a large contract issued by the Defense Department for work to be done in Afghanistan. One of the issues raised by the defense attorneys in early discussions was whether the government could prove materiality. In short, the government believes the defendants won the contract by misrepresenting how they would perform a crucial part of the contract. They did not then perform the contract as they had claimed they would. The defense

attorney argued to us that the government had knowledge of how the work was being performed and continued to pay the contractor for the work being performed. He argued, therefore, that the misrepresentation was not material, relying on *Universal Health Services, Inc, v. United States ex rel. Escobar*, 579 U.S. 176, 195 (2016). ("Escobar"). *Escobar*, by its terms, is limited to civil matters arising under the False Claims Act. 31 U.S.C. §§ 3729 – 3733. It does nonetheless raise at least the prospect of a problem for government agencies in which lower-level bureaucrats dealing with everyday business may not know the terms of agreements reached by upper levels.

I asked Fred to research whether *Escobar* had been extended to criminal matters in any way, particularly in the relevant Circuit. He did an excellent and extensive job of finding how *Escobar* had been interpreted by the courts. We discussed his findings and decided that the *Escobar* ruling, if extended into criminal law, would violate the traditional rule that a defendant should not escape a fraud charge by "blaming the victim."

Fred did an excellent job of researching the matter, explaining it all to me, and writing it up for me. However, I then asked him to go a big step further. I asked him to prepare a draft motion *in limine*. The motion would seek to have the court bar the introduction of evidence or arguments before the jury claiming knowledge by the government of how the contractor was conducting business. The rationale was that since the defendants could not 'blame the victim,' evidence of the government's knowledge would not be relevant to any legitimate issue at trial.

I don't think Fred had ever written a motion before. In my experience, law students are much better at describing the law than arguing it. Nonetheless, he did an excellent job and very enthusiastically made numerous revisions as I suggested and sometimes as I had second thoughts. While the product is still in draft form, I think it is strong and I plan to use it if and when the issue arises.

Besides the excellent work Fred did, I must praise his work ethic. The job I set for him was very new. He worked very hard on each part and his reward was for me to keep expanding the scope of what I wanted. I was also traveling quite a bit while he was working on the matter and was often not available. Fred continued working and was always available whenever I was, regardless of day or

hour. All in all, Fred did a terrific job, worked very hard and was also a pleasure to work with. I recommend him very highly for any legal position.

Sincerely,

/s/ James Gelber
James Gelber
Trial Attorney
United States Department of Justice

U.S. Department of Justice

Criminal Division
Fraud Section

1400 New York Ave, NW
Washington, D.C. 20005

(202) 591-6015
dermot.lynch@usdoj.gov
(202) 941-4533
lauren.kootman@usdoj.gov

July 28, 2023

Your Honor:

We strongly recommend Fred Yu for a position in your chambers. Fred did excellent, quick work for us as a legal intern in the Department of Justice's Fraud Section. We are confident he would provide your chambers with the same high caliber of work that he provided to us and our colleagues in the spring of 2023.

Dermot first met Fred in my capacity as Intern Hiring Coordinator for the Fraud Section, which is a unit within the Department of Justice that handles some of the most complex frauds in the country. Fred's application was an obvious standout in that he had such extensive experience in the financial sector prior to attending law school.

Just around the time Fred started at Fraud, we were preparing for a highly contentious and heavily litigated three-week jury trial against two doctors in Appalachia who stood accused of illegal prescribing and health care fraud connected to urine drug testing. When we asked Fred if he wanted to help on the trial, he jumped at the opportunity and became an integral member of the trial team. Fred spotted a potential tax fraud scheme that we had missed, drafted all manner of legal memoranda on the myriad the issues the well-funded defendants' lawyers could throw at us, leveraged his superior PowerPoint and Excel abilities in creating many of our summary exhibits and slides for closing, and served as a trusted sounding board for how to present a complicated fact pattern to the jury.

Put simply, Fred was the whole package in trial. He was meticulous while also providing quick, streamlined responses that anticipated our needs in the middle of exhausting and contentious days in court. When we needed a few on-point cases to present after an examination, Fred was there with ready examples—along with quick parentheticals that we could provide for the Court. When we asked Fred to "red team" some of our experts by preparing mock cross examinations or attacks on our summary exhibits, he did a frightfully good job and forced us to rethink lines of questioning and how some of the exhibits were presented. We are not sure we would have secured a guilty verdict in the case without all the help that Fred provided.

Finally, in our relatively short time together, Fred struck us as the type of person who knows what he wants in his professional life. He is obviously in the middle of a career pivot and brought to the Fraud Section a maturity that you do not see in students who have fewer life experiences that he has. He has emphasized to us his goal of remaining in public service—likely

as a federal prosecutor—and we hope he achieves this goal. He would certainly make a great addition at the Fraud Section.

Please do not hesitate to contact us with further questions about Fred's abilities and thank you for your consideration of his application.

Respectfully,

/s/Dermot Lynch
Dermot Lynch
Trial Attorney
Criminal Division, Fraud Section

/s/Lauren Kootman
Lauren Kootman
Assistant Chief
Criminal Division, Fraud Section

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

August 08, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Re: Clerkship Applicant Fred Yu

Dear Judge Swank:

I am writing this letter in strong support of Fred Yu's application to clerk in your chambers. I had the pleasure of teaching Mr. Yu in my Sentencing course last fall at Penn Law, where I am an adjunct professor. I also serve as a trial judge for our state court in Philadelphia.

From the first day, Mr. Yu stood out as an exemplary student. He was consistently prepared, and he brought his prior experiences to bear in the discussion as appropriate. He was one of those students who professors love to have in class—he made discussion better without dominating it. His performance in the class was unmatched. Mr. Yu was the only student in the class to earn the highest grade of A+ both for his overall course grade and on the final exam. I typically award that final grade to no more than one student per semester, and Mr. Yu more than earned the distinction. His exam was a true pleasure to read. He did a wonderful job of applying various course readings to unusual fact patterns—demonstrating an impressive ability to conduct a challenging analysis "on the fly" during a timed, three-hour exam. I was additionally impressed by his command of policy arguments and his ability to apply relatively complex punishment theories to the cases we had studied. He had an extraordinary command of the course material. Moreover, I have no doubt that his skill as a clear and concise writer will serve as an enormous asset throughout his legal career, including during his time spent as a law clerk.

Outside the classroom, Mr. Yu met with me regularly to further explore various sentencing topics, and he also visited me at my courthouse to continue our conversations and to discuss his broader career interests, including in public service. On his own initiative, he asked to observe court proceedings so that he could supplement what we had learned together in the classroom. During our meetings, I came to learn that, in addition to being highly intelligent and hard-working, Mr. Yu is a genuinely kind and thoughtful person.

I hope you will strongly consider making Fred Yu a part of life in your chambers. I would be happy to expand on these impressions on the phone at your convenience. Please feel free to call my chambers at (215) 683-7139.

Sincerely,

Anthony Kyriakakis

WRITING SAMPLE

Fred Yu
3201 Race Street, Unit 909
Philadelphia, PA 19104
(646) 279-4746
fyu@pennlaw.upenn.edu

The following writing sample is a memo that I drafted at the request of an Assistant U.S. Attorney during my internship in the summer of 2022. I have been granted permission from the U.S. Attorney's Office for the Eastern District of Pennsylvania to share this with potential employers. This memo has not been edited by others.

Writing Sample

MEMORANDUM

TO:

FROM: Fred Yu

DATE: June 22, 2022

SUBJECT: Supporting Probable Cause to Search D's Cell Phone

Question Presented

D was observed engaging in hand-to-hand drug sales. Officers seized a cell phone from D's person incident to his arrest but have not yet accessed it. Will a warrant to search D's cell phone be supported by probable cause?

Brief Answer

There is no precedential case law on this question in the Third Circuit or in the Eastern District, however, the answer is likely yes. The magistrate judge will have probable cause to believe that there will be evidence of wrongdoing in D's cell phone because: (1) there is substantial evidence of drug trafficking; (2) D had possession of the cell phone concurrently with illegal drugs and a firearm when he was arrested; and (3) the officers, based on their experience, believe that cell phones are often used to facilitate drug trafficking. Although there is no direct evidence linking the cell phone to the illegal activity, the Third Circuit has held that such evidence is not required for a magistrate judge to find probable cause.

Discussion

The search warrant to get into D's cell phone will likely be supported by probable cause. Probable cause exists when, viewed in the totality of circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462

U.S. 213, 214 (1983). The magistrate judge's task is to make this determination based on practical common sense. Id. Having direct evidence linking the place to be searched to the crime is not required for the issuance of a search warrant. United States v. Hodge, 246 F.3d 301, 305 (3d Cir. 2001) (holding that even though there was no direct evidence that drugs were in the defendant's home, the affidavit contained enough evidence for a magistrate judge to determine that there was sufficient nexus for probable cause). Instead, courts are entitled to draw reasonable inferences about where evidence is likely to be kept based on the evidence and the type of offense. Id. (citing United States v. Whitner, 219 F.3d 289, 296 (3d Cir. 2000)).

For drug-related cases, there appears to be no precedential case law at the Third Circuit level or in the Eastern District that establishes what suffices for a probable cause determination in cases that are factually comparable to the present case.[1] However, in the Western District and Middle District, evidence of a defendant's involvement in drug trafficking, a defendant's possession of a cell phone, and law enforcement officers' opinions, based on their training and experience, that cell phones are used to facilitate drug sales are collectively sufficient to support probable cause.

A. One relevant Third Circuit Court case exists, but the search and seizure stemmed from an extensive ongoing investigation into a conspiracy to distribute narcotics rather than an arrest following observations of hand-to-hand drug sales.

United States v. Vetri, 811 F. App'x 79 (3d Cir. 2020) is the only relevant Third Circuit Court case addressing cell phone search warrants in drug-related arrests.[2] In Vetri, the defendant

[1] There was no persuasive case law in the Eastern District. The only drug-related case, aside from United States v. Vetri, No. CR 15-157, 2017 WL 11368308 (E.D. Pa. 2017), in which a cell phone search was challenged, was United States v. Harris, No. 18-CR-315-7, 2022 WL 1748551 (E.D. Pa. 2022). However, the defendant in Harris challenged the search based on the poisonous tree theory and not probable cause. Id. at 3.

[2] In United States v. Fernandez, 652 F. App'x 110 (3d Cir. 2016), the defendant challenged a cell phone search pursuant to a warrant based on the poisonous tree theory, but did not challenge probable cause for the cell phone search warrant.

was convicted of murder and conspiracy to distribute oxycodone. 811 F. App'x at 81. Prior to his arrest, the defendant was the subject of an investigation conducted by a multi-agency task force comprised of ATF, FBI, DEA and IRS agents. United States v. Vetri, No. CR 15-157, 2017 WL 11368308, *1 (E.D. Pa. 2017). Agents seized multiple cell phones when they conducted a search of the defendant's home and extracted data from those phones. Id. at *5.

The defendant argued that because the affidavit for probable cause did not mention cell phones and none of the confidential sources stated that the defendant owned or used cell phones there was insufficient probable cause. Vetri, 811 F. App'x at 81-82. However, the court explained that because the affidavit used the language "electronic equipment such as," the list of devices therein was simply illustrative, and cell phones fall squarely in the category of electronic equipment. Id. at 82. Moreover, the Third Circuit noted its agreement with the district court that the totality of circumstances suggested there was fair probability that contraband would be found on the defendant's cell phone. Id. Although the Third Circuit did not explain why it agreed with the district court, the district court noted in its holding that the facts in the affidavit "together with common sense and the agent's reasonable inferences about where the sought-after records would be stored, provided Judge Hart with a substantial basis for including cell phones in the search warrant." Vetri, 2017 WL 11368308 at *10.

There are notable differences between Vetri and the present case involving D. The defendant's arrest in Vetri followed a broad investigation into numerous state and federal crimes, including distribution of illegal narcotics, insurance fraud, wire fraud, mail fraud and tax fraud, over a longer period of time. This provided the magistrate judge with more substantial evidence of the defendant's involvement in criminal activities. See Id. at *1 (explaining that the affidavit supporting the warrant contained "detailed facts on a number of alleged crimes over a more than

four-year period"). Here, D was only observed in a one-time hand-to-hand drug deal and was not part of any ongoing investigation. Additionally, the district court in Vetri noted that the affidavit supporting the warrant made reference to the defendant communicating with others and reasoned from this that there was an implication the defendant was making telephone calls. Id. at *9. Here, other than communication incident to the immediate sale of drugs to the buyer, there is no evidence that the defendant was communicating with other parties.

B. Persuasive case law in other Third Circuit district courts support probable cause to search the cell phone because it belongs to D, there is evidence linking D to drug trafficking, and law enforcement believes cell phones are a tool for drug trafficking.

In assessing probable cause, other Third Circuit district courts do not require evidence of a direct link between the cell phone and the crime, and the courts give substantial deference to law enforcement's experience that cell phones are an essential tool of the drug trade as a basis for the requisite nexus. Therefore, if (1) the cell phone is linked to the defendant, (2) the defendant is connected to the drug trafficking, and (3) the officers believe, based on their experience, that cell phones are a tool for drug trafficking, the courts will uphold a magistrate judge's finding that probable cause exists.

In United States v. Johnson, No. 2:17-CR-00243, 2019 WL 5288015 (W.D. Pa. 2019), the defendant, who was charged with possession with intent to distribute narcotics and illegal possession of a firearm, sought to suppress evidence from the search of his cell phones. Plain clothes officers patrolling a high crime area observed the defendant engaging in a hand-to-hand drug deal on the sidewalk outside his residence. Id. at *2. The officers then stopped the buyer and noticed a baggy of narcotics similar to the one observed in the hand-to-hand deal they just witnessed. Id. The buyer confirmed that he purchased drugs from the defendant. Id. The officers then obtained an arrest warrant for the defendant and recovered two cell phones from his pockets

during the arrest. Id. While searching the defendant's residence, police recovered a firearm, substantial quantities of narcotics, cash, and narcotics paraphernalia. Id. at *12. Both the police and the ATF, when they adopted the case, obtained state and federal search warrants for the defendant's cell phones. Id. at *3-4.

In challenging the warrants, the defendant argued, *inter alia*, that there was insufficient nexus between the cell phone and the crimes. Id. at *11. The court, however, held that a defendant's ownership of the phone, evidence linking the defendant to the crime, and the detective's "stated experience that cell phones are often used in narcotics crime" formed a sufficient basis to meet the probable cause requirement. Id. at *13; see also United States v. Somerville, No. CR 17-222, 2019 WL 1316413 (W.D. Pa. 2019) (holding that there was probable cause to support a cell phone search warrant because narcotics were found in a car owned by the passenger following a routine traffic stop, multiple cell phones were in possession of the passenger, and the officers' opinion, based on their training and experience, that cell phones are tools of the drug trade); United States v. Carey, No. 3:CR-18-037, 2020 WL 59607, *2-3 (M.D. Pa. 2020) (holding that there was sufficient nexus between a cell phone and drug trafficking because the officer indicated in the affidavit that "individuals associated with the distribution of drugs often utilize multiple cellular telephones and/or frequently change their telephone numbers in an effort to conceal their criminal activities," and such individuals "often use cellular communications. . . to arrange drug transactions" as well as to "take pictures of their drugs and/or money obtained from the sale of drugs"). In its decision, the court identified the following key assertions from the affidavit supporting the warrant: (1) substantial quantities of narcotics, paraphernalia, currency, and a firearm were recovered from the home; (2) the defendant was present at the property when officers arrived; (3) the defendant was observed

coming and going from the residence on a daily basis; (4) the keys to the home were found on the defendant; (5) the owner of the home was the defendant's mother; (6) the two cell phones were found on the defendant's person; and (7) the officer's combined training and experience allowed him to recognize that cell phones are often used in furtherance of drug crimes. Johnson, 2019 WL 5288015 at *12.

The court further explained that evidence of a direct link between the cell phone and the crime is not required to find probable cause. Id. at *13 (citing United States v. Brewer, 708 F. App'x 96, 99 (3d Cir. 2017) (holding that a magistrate's probable cause determination with respect to a cell phone search was reasonable based on defendant's ownership of a cell phone and evidence connecting the defendant to a robbery)). The court acknowledged that other courts have in part based their probable cause determinations on evidence that the cell phone was "used in relation to [the defendant's] offenses." Johnson, 2019 WL 5288015 at *13. Specifically, the defendant relied on United States v. Gorny, No. CRIM. 13-70, 2014 WL 2860637 (W.D. Pa. 2014) to argue for a higher burden in supporting probable cause. Johnson, 2019 WL 5288015 at *13. In Gorny, the court reasoned that there was a clear nexus between the defendant's cell phone and his drug trafficking because the defendant provided an undercover officer with his cell phone for future drug purchases. Gorny, 2014 WL 2860637 at *6. However, the court in Johnson made clear that although the facts in cases like Gorny happened to create a stronger nexus upon which the magistrate judge relied, this did not mean that such a high burden was required to find probable cause. Johnson, 2019 WL 5288015 at *13.

1. Evidence of D's connection to drug sales, D's possession of a cell phone, and the officer's training and experience are likely sufficient for the magistrate judge to find probable cause to search D's cell phone.

Here, the factual circumstances are notably similar to those in Johnson and Somerville. First, there is strong evidence of drug trafficking. The officers observed D engaging in hand-to-

hand drug sales out of his car just as the officers in Johnson witnessed the defendant in that case selling drugs outside of his residence. Further, like the officers in Johnson, the officers here were able to confirm the drug sale by stopping and obtaining confirmation from the buyer. The officers also searched D's car, which was the location from which he was observed selling drugs, and recovered twenty-five packets of crack cocaine, marijuana, cash, and a firearm. Likewise, the police in Johnson conducted a search of the home from which the defendant was trafficking drugs and recovered substantial narcotics, drug paraphernalia, cash, and a firearm.

Second, the cell phone at issue is linked to D. The officers found D's cell phone while searching his car immediately after observing the drug sales. Similarly, in Somerville, the seizure of cell phones from the defendant occurred virtually contemporaneously with the observations of drug trafficking, and in Johnson, the cell phones were found on the defendant's person.

Therefore, because there is evidence of D's drug trafficking, because the officers recovered a cell phone while searching D's car, and provided that the officers here believe, like the officers in Johnson and Somerville, that based on their training and experience cell phones are an essential tool of the drug trade and express such belief in their affidavit, the magistrate judge will likely find that there is probable cause to support a search warrant for D's cell phone.

C. District courts outside the Third Circuit have also found that a law enforcement officer's opinion that cell phones are a tool of the drug trade creates a sufficient nexus between the cell phone and the crime.

Several district courts have held that a sufficient nexus for probable cause exists when there is evidence of drug trafficking and the law enforcement officers involved in the case believe, based on their experience, that cell phones are used to facilitate drug trafficking. See, e.g., United States v. Henry, No. CR 14-10319-DJC, 2020 WL 58418 (D. Mass. 2020), aff'd, No. 20-1260, 2021 WL 7451131 (1st Cir. 2021) (holding that individually wrapped bags of crack cocaine, $830 of cash, and the officer's experience that cell phone are tools used in drug sales

established probable cause to search the defendant's cell phone.); United States v. Fogg, No. 1:18-CR-00156-LEW, 2019 WL 1111194 (D. Me. 2019) (responding to the defendant's challenge that because there was no evidence of cell phone communications between himself and the co-conspirators, there can be no probable cause to search the cell phone, the court held that the First Circuit is "teeming" with opinions that law enforcement's training and experience yield insights that support probable cause determinations.); United States v. Alatorre, No. 019CR00061ECTKMM, 2019 WL 5149971 (D. Minn. 2019) (holding that although the warrant to search the defendant's cell phone would have been stronger had there been a connection between the cell phone and drug trafficking, it was not unreasonable for the judge to infer there would be evidence of criminal activity on a phone found inside a vehicle containing forty pounds of methamphetamine being shipped across the country); United States v. Green, No. 5:19-CR-00026-TBR, 2020 WL 130585 (W.D. Ky. 2020) (finding sufficient nexus between the crime and the cell phone when a routine traffic stop resulted in discovery of significant narcotics because "the inclusion of the substantial amount of contraband, evidence of cross-country drug transportation, multiple cell phones, and the affiant's significant law enforcement experience are particularly persuasive"). But see United States v. Ramirez, 180 F. Supp. 3d 491 (W.D. Ky. 2016) (holding that mere possession of a cell phone during an arrest for drug trafficking is insufficient nexus and that an officer's training and experience cannot substitute for lack of evidence for such nexus).

However, some district courts, in finding probable cause for cell phone searches, have relied on more direct evidence connecting the cell phone to drug trafficking. See, e.g., United States v. Steffens, 418 F. Supp. 3d 337 (N.D. Iowa 2019), aff'd sub nom. United States v. Lillich, 6 F.4th 869 (8th Cir. 2021) (reasoning that there was sufficient probable cause for a cell phone

search warrant because the defendant was the driver of the car in which drugs were found and the driver was contacted on his cell phone to pick someone up at a casino that a location where drug sales often occurred); United States v. Clark, No. 20-CR-0223 (WMW/LIB), 2021 WL 5630791 (D. Minn. 2021) (reasoning that surveillance video of the defendant using the cell phone during a money order transaction at a post office, along with the large quantity of meth, firearms, large amounts of cash, and other objects indicative of drug trafficking that were recovered sufficiently established the requisite "nexus.").

Conclusion

There is likely probable cause to support a search warrant for D's cell phone, provided that the officers believe, based on their training and experience, that cell phones are tools of the drug trade. Cell phones are used by criminals to communicate and coordinate with one another and are therefore likely to produce evidence of associations, drug customers, and drug suppliers. Fogg, 2019 WL 1111194 at *6 (citing the officer's statements in an affidavit supporting a warrant to search a drug dealer's cell phone). Information extracted from cell phones can allow law enforcement to "locate an individual who wishes to purchase illegal drugs or a co-conspirator involved in the transaction of illegal drugs," cell phones "provide investigators with a history of an individual's location before, during, and after a crime were [sic] two or more people may be together to plan out the crime," and "person(s) frequently use electronic communication devices, to include cellular telephones, to communicate the date, time, size, location and nature of the illegal transfer of either money or drugs." Henry, 2020 WL 58418 at *3 (quoting an officer's statement in an affidavit supporting a warrant to search a drug dealer's cell phone).

Although there is no direct evidence that D was using his cell phone to facilitate the illegal activity, the Third Circuit has held that such direct evidence linking the place to be

searched and the crime is not a requirement for a probable cause determination. Here, the officers witnessed the hand-to-hand drug sale that was later confirmed when they stopped the buyer, they found significant amounts of illegal drugs packaged for distribution in D's car along with significant cash and a firearm in his possession at the time of arrest. In other Third Circuit district courts, such substantial evidence of drug trafficking along with an officer's opinions that cell phones are used to facilitate drug sales would support probable cause. The magistrate judge's inference that D was using his cell phone to further drug trafficking would be deemed reasonable. However, direct evidence linking D's use of a cell phone to the illegal activity would clearly bolster a warrant application.